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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO HERNANDEZ,

Defendant and Appellant.

A135426, A138001

(Alameda County  
Super. Ct. No. C161685)

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In re FRANCISCO HERNANDEZ

On Habeas Corpus

A jury convicted Francisco Hernandez of murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), willful, deliberate, and premeditated attempted murder (§§ 187, subd. (a), 664, subd. (a)), and assault with a firearm (§ 245, subd. (a)(2)). The jury also found that defendant personally and intentionally used and discharged a firearm causing great bodily injury (§§ 12022.5, subd. (a); 12022.7, subd. (a); 12022.53, subds. (b), (c) & (d), and that he committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced defendant to 75 years to life in state prison. In his appeal and in his concomitantly filed petition for writ of habeas corpus,<sup>2</sup> defendant raises numerous

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

<sup>2</sup> We previously denied defendant's request to consolidate his habeas petition pending further consideration of the appeal. We now grant consolidation of the appeal and petition.

claims of reversible error, including: 1) evidentiary error; 2) instructional error; 3) prosecutorial misconduct; 4) due process violation in failing to have an impartial jury; 5) cumulative error; and 6) ineffective assistance of counsel. We affirm.

## **I. EVIDENCE AT TRIAL**

### **A. *Prosecution's Case***

#### **1. *Murder of Marco Casillas and Attempted Murder of Janett Mendoza***

Around 10:30 p.m. on September 19, 2008, 20-year-old Janett Mendoza and her fiancée Marco Casillas, also 20 years old, went out to walk Mendoza's dog. Neither Mendoza nor Casillas had any gang affiliations. However, Casillas, who loved hats, was wearing a red Phillies baseball cap. To defendant, an avowed Sureño gang member, affiliated with the South Side Locos (SSL) subset, anyone wearing the color red was considered an enemy.

Mendoza saw a white car parked at the corner and she heard "huffing and puffing." She asked Casillas if someone was being chased. Casillas partially turned around and told her, "Baby, the guy behind us has a big gun." Mendoza then heard gun shots. As she turned around, she came face to face with defendant, who was wearing a black hoodie and jeans. Defendant had a "big gun" in his hands, which Mendoza noted had "wood" in it. Mendoza's focus was on defendant's face, which she could see clearly. Nothing obstructed her view of defendant. She was approximately 16 feet from defendant when she first turned around and saw him with the gun. Though it was nighttime, the area was illuminated by the streetlights, a house light, and by the gun fire itself.

Mendoza kept her eyes on defendant as he was shooting the gun at Casillas. She looked directly at this face for approximately 20 seconds. During this time, she had a "good view" of defendant and could clearly see his face. Mendoza testified that seeing defendant's face for those 20 seconds, left a "lasting impression" on her. Mendoza "vividly" recalled defendant's face. She described him as a male Latino, chubby build, between 5'6" and 5'8", with a closely tapered hairstyle, and a thin line of facial hair from

his lip to his chin. What stood out the most for her were defendant's "eyebrows and his eyes."

After shooting Casillas, defendant turned the gun on Mendoza. Mendoza testified that even after being shot and falling to the ground, she still had a clear view of defendant's face. Mendoza was "100 percent sure" that defendant was the person who shot her and Casillas.

Mendoza was hospitalized for months, underwent more than five surgeries, and was not released until just before Thanksgiving of 2008. Most of what she remembers about her time in the hospital was being in pain and "pretty out of it," from the medication. She had no recollection of speaking with Sergeant James Rullamas while she was in the hospital. She was not given any information about the case and was not shown any photographs until after she was released from the hospital.

## *2. Police Investigation and Photo Identification of Defendant*

Sergeant James Rullamas was assigned to investigate the shootings. He had been with the Oakland Police Department since 1992 and had been a homicide inspector since 2001, investigating between 150 and 175 homicides at the time of the charged crimes. Casillas was pronounced dead shortly after 11 p.m. on the night of the incident.

Two days after the shootings, it was still unclear whether Mendoza would survive. Sergeant Rullamas went to the hospital to see her but was unable to get any statement. He went back several days later, but Mendoza was too heavily medicated and he abandoned any attempt to get a statement. At this visit, Mendoza said the shooter had an "average build."

Sergeant Rullamas began to receive word about the shootings several days later. On September 24, he received an anonymous tip that "Bandit" was the shooter, and that the shooting was gang-related. That same day, Sergeant Rullamas spoke with Mendoza's mother, Sandra Reyes, who stated that a man may have been following her, and that he was holding what appeared to be a rifle. Sergeant Rullamas put together a photo lineup

and Reyes identified defendant's cousin, Manuel Hernandez.<sup>3</sup> Manuel's street name was "Bandit."

Sergeant Rullamas requested that officers find Bandit and arrest him for weapons possession. Later that evening, police located Bandit during a traffic stop. The driver of the car was Fernando Ulloa. Bandit and defendant were passengers.

Following the automobile stop, all three occupants, including defendant, were brought to the station for interviews. Defendant was wearing a black hoodie and had a thin line of facial hair from his lip to his chin. Defendant had a blue bandana and several gang-related writings in his possession at the time of the traffic stop. The writings were copied and the property was returned to defendant following his interview.

In the early morning hours of September 25, homicide investigator George Phillips learned that defendant was in an interview room at the station. Officer Phillips was investigating "an incident and hoped [defendant] could provide some information." Defendant was not under arrest at the time he met with Officer Phillips. The interview was recorded and a portion of it was played for the jury.

During the interview, defendant said that he was known as "Zapper," and admitted that he was a current member of SSL and had been with SSL for about six years. Defendant said that he had gone to Lazear elementary school, and that he went to a continuation high school because he got into too many fights. Bandit was his cousin.

On September 26, Sergeant Rullamas received an e-mail from Mendoza's cousin, Elizabeth Torres, with photographs and links to defendant's MySpace page. The links showed numerous gang writings and showed defendant holding a revolver to his head with the caption, "We are at war now."

On October 6, Victor Ayala, a former SSL member, called the Oakland Police Department, advising them that he had discovered a rifle in a garbage can outside of his apartment. The responding officer conducted a probationary search of Ayala's

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<sup>3</sup> To avoid confusion with defendant, we shall refer to Manuel Hernandez, as "Manuel" or "Bandit."

apartment,<sup>4</sup> which revealed ammunition for a .38 caliber handgun and an assault rifle in the closet. An additional .38 caliber handgun was found in Ayala's car. Ayala was arrested. The assault rifle obtained from Ayala was later determined to be the weapon used in the shootings that killed Casillas and severely wounded Mendoza.

On December 1, Sergeant Rullamas interviewed Mendoza at the police station, where she provided a very detailed description of the shooter, stating that he was a 19 to 22 year old Latino male, chubby or even very heavysset (250 pounds plus), 5' 8", with a round face and a thin strip of hair down his chin. Sergeant Rullamas was aware that this fit the description of defendant, aka Zapper. Unlike her time in the hospital, Mendoza was now coherent and articulate. She was absolutely certain she could identify the shooter.

With the assistance of a computer matching program, Sergeant Rullamas prepared a photo lineup that included defendant's picture. He selected photographs to ensure that defendant was not the youngest, not the oldest, not the heaviest, nor the lightest. All of the potential suspects had facial hair, but Sergeant Rullamas admitted that matching the thin strip down the chin was difficult.

Mendoza, after receiving the standard admonition regarding photo lineups, identified defendant's photograph right away. She selected defendant's photo within seconds and was very emotional. Prior to this time, she had never been shown any photographs of defendant.

Thereafter, Sergeant Rullamas obtained a warrant for defendant's arrest and to search various social networking sites he frequented. Defendant's MySpace page had significant gang-related language, it appeared that the page had been cleaned. The page listed defendant's occupation as "Busta killa homie." Sergeant Rullamas obtained the MySpace photos which contained numerous references to Zapper and to SSL. A subsequent search of defendant's residence contained more of the same, as did the phone he was carrying at the time of his arrest.

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<sup>4</sup> Ayala's wife was on probation.

### 3. *Gang Evidence*

Defendant is a self-admitted Sureño member within its sub-sect, SSL. He was housed in the Sureño unit of the Santa Rita County Jail upon his arrest. He had numerous gang tattoos and even had his eyebrows trimmed and shaved to resemble SSL.

Gang expert Douglass Keely testified that defendant was a “shotcaller”—a high ranking and experienced member—of SSL. After giving general information about local Oakland gangs and the rivalry between the Sureños, Norteños and Border Brothers, Keely described how SSL is the main crew of the Sureños in Oakland, with approximately 30 to 50 members. Because they are so heavily outnumbered by the rival Norteños, they are forced to become much more violent in order to gain respect, to promote the gang’s purposes, and to recruit new members. The gang readily possesses and passes firearms from member to member as needed to provide weapons and to protect those who have recently used them from discovery. Keely explained the concept of “gang guns” in which the weapons are shared rather than owned by individual members.

Keely described the primary purposes of SSL as encompassing murder, attempted murder, shootings and assaults, and illegally carrying concealed or loaded weapons. He further described specific offenses committed by SSL members and how he had observed defendant and other members of SSL posing for pictures in gang clothing on Cinco de Mayo. During a recent search of a gang residence, Keely had personally observed photographs of defendant and other SSL members holding large rifles, captioned with gang slogans including SSL, VL (Varrio Loco) and “Chap Killer.”<sup>5</sup>

Keely testified that killing equates to respect for gang members, that members will go “ ‘hunting’ ” for rivals, generally in packs to validate kills, and how they did not hunt for specific persons, but only for specific targets. He explained how a shotcaller from the gang will go hunting with less experienced members to set an example for

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<sup>5</sup> Keely explained that “chap” is short for “chapeto,” which is a derogatory name for a Norteño.

them, and how this was called “putting in work.” He testified that a person wearing a red hat in Norteño territory is likely to become a target, regardless of whether they are actually a gang member. Keely opined, based on a hypothetical with facts similar to the instant case, that the shootings were committed for the benefit of SSL.

Keely was aware of the investigation in the present case and described the gang connections among numerous people mentioned during trial. He described the area encompassing the shooting as Norteño territory. He further described Bandit’s residence as an SSL safe house, how his mother even supports Bandit’s gang activities, and how his neighbors began complaining of vandalism and gang activity soon after they moved in.

Keely was present on December 29, 2008, when defendant was arrested for the instant shootings. Defendant was seated in the backseat of a Nissan with other gang members inside or around it. Keely collected gang indicia from the Nissan, specifically “[s]ome CDS with . . . [SSL] gang graffiti [on them] and a blue belt.”

Keely was also responsible for the search of defendant’s residence. Prior to entering the residence, Keely noticed that SSL had been spray painted on the ground. Inside the residence, officers found a rifle and a black folder with gang writing in it. Much of the writing had defendant’s gang moniker “Zapper” scrawled all over it and contained what appeared to be handwritten rap lyrics of a very violent nature. The writings also specifically referenced use of AK-47’s and 30-round clips such as were used in the present shooting. The writings also referenced the Sureños practice of not committing drive-by shootings; instead getting out of the car and firing face to face.

The writings discussed defendant’s gang lifestyle and loyalty to the “South Side.” For example, defendant had written rap lyrics found at his mother’s place with the name “Zapper” on it stating the following: “ ‘Blue rag up 2the fuckin sky from the 14 Bay east Side Bangin SOUTH Fuck north SIDE, that’s right.’ [¶] . . . ‘Stop before you get pop[p]ed’ . . . [¶] ‘You gone shoot back I think not. I’m aim 2 the top. Blue rag 2 show what I’m dissin enemies. Listen all my homies bumpin’ . . . [¶] ‘This is how my homies kill.’ ‘Unload the clip chapetes.’ ‘We just drive around killing chaps. Ask Zapper from SSL’ . . . ‘They call me Zapps. I love 2 kill chaps. That’s my thing.’ ‘I’ll kill your wife,

your family, and your mothafucking friends. I keep my blue rag on my left cause the right way is wrong, my rifles are long.’ ‘I’m SSL saying fuck BB and Norte.’ . . . [¶] ‘I hang not just me my homies. We blast with shot guns 9s and 22s.’ ‘Where we pack AKs Homie say something you got spray East Bay were we blue rag all day.’ . . . [¶] . . . [¶] ‘South side locos gang we known 2 get wild.’ ‘SSL click.’ . . . [¶] ‘SSL click we causeing trouble. 9 milla an extra clips on the doble for talking shit. End up in a red puddle and this for reals you a Chapeta you blood gon spill Zapper Loco Quick 2 kill.’ . . . ‘I keep it blue . . . I’m SSL savage.’ ‘All I do is fuckin shoot busters in caskets.’ ‘We destroy all chaps.’ ‘They get sprays.’ ‘SSL do play. We just drive around killin busters.’ ”

Again referencing himself as “ ‘Zapper from Da SSL,’ ” defendant writes: “ ‘I got A 30 round clip bullets I got a chopper’<sup>[6]</sup> . . . ‘SSL click we causeing trouble. 9 milla an extra clips on the doble for talking shit. End up in a red puddle and this for reals you a Chapeta you blood gon spill Zapper Loco Quick 2 kill’ . . . ‘I smoke people like ice, serving foo like I was nice thanks God thats not the case.’ Zapper Loco loco with three dot on my face.’ ”

#### *4. Forensic Evidence*

Ballistics experts matched the eight casings found at the scene with the AK-47 recovered from Ayala’s residence. Ayala was known as “Trucho.”

#### ***B. Defense Evidence***

Several friends and relatives testified that defendant was at home the entire evening of September 19th.

Defendant presented testimony from Robert Shomer, Ph.D., an expert in the field of eyewitness identification. Dr. Shomer testified to various problems related to the accuracy of eyewitness identifications.

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<sup>6</sup> Keely explained that “choppers” are “machine guns, AK 47s.”

## II. DISCUSSION

### A. *Gang Expert Testimony*

Defendant contends the admission of photographs showing him flashing gang signs and wearing blue, gang-related writings, and weapons/ammunition other than the murder weapon, together with the testimony of a gang expert, was highly prejudicial, cumulative, and its probative value was minimal. He claims that the admission of such evidence constitutes a violation of his federal constitutional due process rights. The Attorney General contends defendant forfeited his arguments by failing to object on the asserted grounds at trial. Based on our review of the record, defendant forfeited his evidentiary claims. (Evid.Code, § 353, subd. (a) [a judgment shall not be reversed based on erroneous admission of evidence unless the record shows the party seeking reversal objected to the evidence on the specific ground raised].)

Although it appears that defense counsel raised a “blanket objection” to the gang evidence and improper expert testimony (see Evid. Code, §§ 801, 802) there is nothing showing an objection to the gang expert’s testimony, and nothing on the grounds now raised on appeal. In any event, we reject defendant’s arguments on the merits.

It is generally recognized that evidence of a defendant’s gang membership, when introduced in a prosecution unrelated to the gang’s activities, tends to be prejudicial because it suggests a criminal disposition. (*People v. Pinholster* (1992) 1 Cal.4th 865, 945, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) When such evidence is relevant to prove an element of the crime, however, it may be admitted if, after careful scrutiny, it is found more probative than prejudicial. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

Where, as here, a section 186.22 gang enhancement allegation is pleaded, the defendant’s gang membership becomes an element of the prosecution’s case. Section 186.22 imposes a sentence enhancement for a felony “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (*Id.*, subd. (b)(1); *People v. Loeun* (1997) 17 Cal.4th 1, 4.) “To establish a gang enhancement, a prosecutor

must prove facts beyond the elements of the underlying offense. [Citation.]

‘Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense.’ ” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820.)

To prove a section 186.22 gang enhancement, the prosecution must demonstrate that the defendant was a member of a “criminal street gang,” as defined by the statute. “The act defines ‘criminal street gang’ as any ongoing association that consists of three or more persons, that has a common name or common identifying sign or symbol, that has as one of its ‘primary activities’ the commission of certain specified criminal offenses, and that engages through its members in a ‘*pattern of criminal gang activity*.’ ” ([§ 186.22], subd. (f), italics added.) A gang engages in a ‘pattern of criminal gang activity’ when its members participate in ‘two or more’ specified criminal offenses (the so-called ‘predicate offenses’) that are committed within a certain time frame and ‘on separate occasions, or by two or more persons.’ ” (*People v. Loeun, supra*, 17 Cal.4th at p. 4.) The prosecution may prove a “pattern of criminal gang activity” through evidence pertaining to the charged offense and at least one other offense committed on a prior occasion by a fellow gang member. (*Id.* at pp. 4-5.) Similarly, the requirement that one of the gang’s “primary activities” is the commission of the statutory crimes is generally proven through evidence of past crimes committed “consistently and repeatedly” by the defendant and other gang members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324, italics omitted; see also *People v. Tran* (2011) 51 Cal.4th 1040, 1049-1051.)

The allegation of a section 186.22 enhancement, however, does not give the prosecution an unlimited ability to introduce gang evidence. As defendant correctly argues, the admission of gang evidence is always subject to Evidence Code section 352, which requires the exclusion of evidence that is more prejudicial than probative. While some evidence of a gang’s criminal and other activities is necessary to prove a gang enhancement, the prosecution has no right to “ ‘over-prove’ ” the case or put on “ ‘all the evidence that they have.’ ” (*People v. Williams* (2009) 170 Cal.App.4th 587, 610.) “[N]either the prosecution nor the defendant has a right to present cumulative evidence

that creates a substantial danger of undue prejudice [citation] or that unduly consumes the court's time . . . . [¶] . . . [¶] Although no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term 'cumulative' indeed has a substantive meaning, and the application of the term must be reasonable and practical." (*Id.* at p. 611.) This is particularly true when the defendant's gang membership and the status of the gang are "not reasonably subject to dispute." (*Ibid.*; *People v. Leon* (2008) 161 Cal.App.4th 149, 169.) We review the trial court's admission of gang evidence under these circumstances for abuse of discretion. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 225.)

The overarching theme of defendant's claim of error is that the highly prejudicial nature of the gang evidence far outweighed any probative value, particularly since his gang affiliation was not in dispute. Defendant's self-admission to being a gang member does not entitle him to a blanket exclusion of evidence regarding his gang-related activities. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 865-866; *People v. Tran*, *supra*, 51 Cal.4th at pp. 1048-1049; *People v. Leon*, *supra*, 161 Cal.App.4th at p. 62.) Rather, the prosecution has a right to prove its case, including evidence that is unfavorable to the defendant. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 865-866 ["Even if defendant focused his efforts at trial on disputing his identity as the perpetrator, the prosecution was required to prove its case, including the intent elements of the charged crimes"].)

Here, the challenged evidence went beyond simply authenticating defendant's admissions that he was in a gang. The expert opined that defendant was a loyal, high-ranking "shot caller" in the gang, that he was responsible for "putting in work" in order to motivate younger, less-experienced gang members, that this particular murder was likely committed as an example of "putting in work," that the "work" involved going out in a group (in order to validate the killing), and hunting for rival gang members to shoot, that the motive for the shooting was gang-related, and that killing provides respect. It was largely irrelevant that the victims were not rival gang members; only that they may have appeared that way to defendant. As the expert opined, a person wearing a red hat in a

Norteño neighborhood was likely to be perceived as a Norteño, regardless of whether he or she was a gang member. Furthermore, the expert discussed the fierce rivalries between the various gangs, and he opined that SSL was particularly violent out of necessity (because they were significantly outnumbered by other gangs and therefore had to use more violence to earn an equivalent amount of street credibility) , that the members routinely had access to weapons, that weapons were readily passed around among the members rather than owned by a particular individual , and that a gang member was much more likely to take a weapon into enemy territory. Evidence of guns, photographs of defendant with guns, and writings containing multiple references to committing violent acts, was admissible to support the expert’s opinion and to establish the gang enhancement.

Defendant has failed to show that the probative value of the evidence was “substantially outweighed” by the probability its admission would cause “undue prejudice.” (Evid.Code, § 352.) The type of prejudice with which Evidence Code section 352 is concerned with is that which tends to evoke an emotional bias against a party or to cause a jury to prejudge a party based on factors other than the evidence presented at trial. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491; *People v. Tran*, *supra*, 51 Cal.4th at p. 1048.) In this case, the gang expert’s testimony was no more prejudicial than other evidence introduced at trial. Additionally, the challenged evidence was much less inflammatory than the eyewitness testimony concerning the facts surrounding the charged offenses and did not rise to a level of evoking an emotional bias against defendant.<sup>7</sup>

In sum, the trial court did not abuse its discretion in admitting the gang expert’s testimony and related evidence because the gang evidence was relevant to material issues in the case and its probative value was not outweighed by the probability of undue

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<sup>7</sup> For the first time in his reply brief, defendant argues that the prejudicial effect of the gang evidence was demonstrated by the jurors concern for their own personal safety. It is well-established that issues raised for the first time on appeal in a reply brief, denying respondent an opportunity to respond to the issue, will not be addressed on appeal. (*People v. Zamudio* (2008) 43 Cal.4th 327, 353-354.)

prejudice. Further, having found that the evidence was properly admitted, we conclude the admission of the evidence did not violate defendant's rights to due process and a fair trial.

***B. Eyewitness Identification Expert Testimony***

Defendant contends his murder conviction must be reversed because the trial court erred when it limited the testimony of Dr. Shomer. He adds that the error deprived him of his constitutional right to present a defense. Defendant further claims that his trial counsel was ineffective for failing to move to suppress Mendoza's in-court identification and for failing to adequately prepare Dr. Shomer.

*1. Expert Testimony*

During cross-examination of Dr. Shomer, the prosecutor asked him about what he did to evaluate the eyewitness identification in the instant case. Specifically, the prosecutor asked Dr. Shomer if he had reviewed Mendoza's videotaped interview and if he had read an excerpt of the transcript of that interview. Dr. Shomer replied that he had neither watched the videotape nor read the transcript. The prosecutor then asked Dr. Shomer if he had looked at the photo lineup in the case. Dr. Shomer explained that he had "not had a chance" to look at the photo lineup in this case. On redirect examination, defense counsel requested to show the photo lineup to Dr. Shomer. The court ruled that counsel could ask general questions about photo lineup procedures, but could not ask specific questions about the photo lineup used in this particular case.

A defendant has a right to present testimony of witnesses in his defense, subject to the condition that "a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Due process does not require that a court allow an accused to present evidence in the exact form, manner, and quantum the defense desires, and may properly preclude its use pursuant to Evidence Code section 352. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

When a defendant on appeal challenges a trial court's evidentiary rulings in the context presented by defendant here, a reviewing court applies well-settled standards of review: "[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald* ), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Accordingly, a trial court may allow expert testimony that "informs the jury of certain factors that may affect such an identification in a typical case," while at the same time limiting such "to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness." (*McDonald, supra*, at pp. 370-371.) In other words, a trial court may properly exclude expert testimony that potentially takes over the jury's task of judging credibility by telling the "jury that any particular witness is or is not truthful or accurate in his identification of the defendant." (*Id.* at p. 370.)

Here, the trial court implicitly ruled that it was for the jury to decide, based on the factors described by Dr. Shomer, whether the photo lineup utilized in this case was problematic. We see no more in defendant's case than a proper application of *McDonald*-like parameters on an expert's testimony. The court did not severely restrict defendant's expert witness or otherwise preclude defendant from presenting a defense. Rather, the court did no more than preclude defendant's expert from directly telling the jurors how they were supposed to view the six-pack photo lineup. There was no error. (*McDonald, supra*, 37 Cal.3d at pp. 370-371.)

## 2. *Failure to Suppress Identification*

Defendant next claims ineffective assistance of counsel based upon trial counsel's failure to move to suppress the purportedly suggestive photographic array. He claims that the pretrial identification procedure was so impermissibly suggestive that it tainted the in-court identification by Mendoza.

To support an ineffective assistance of counsel claim, the reviewing court must determine that counsel's performance " 'fell below an objective standard of reasonableness . . . under prevailing professional norms' " and that there is a reasonable

probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).)

A pretrial photographic lineup violates due process when it is so impermissibly suggestive that it creates a “very substantial likelihood of irreparable misidentification.” (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) The defendant bears the burden of proving unfairness “as a ‘demonstrable reality,’ not just speculation.” (*Ibid.*) The threshold test is whether the pretrial “ ‘identification procedure was unduly suggestive and unnecessary.’ ” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) If the test is met, the question becomes whether a subsequent identification at trial was nevertheless reliable under the totality of the circumstances, taking into account such factors as the witness’s opportunity to view the offender at the time of the crime, the witness’s attentiveness, the accuracy of the witness’s prior description, the level of certainty displayed at the identification, and the time elapsed between the crime and the identification. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Wash* (1993) 6 Cal.4th 215, 244.)

There is no requirement that a defendant in a lineup be surrounded by others “ ‘nearly identical’ ” in appearance. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) For example, distinguishing clothing does not necessarily cause a photographic lineup to cross into the realm of unconstitutional suggestiveness. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Lineups have been upheld when the defendant was the only person in jail clothing (*People v. Johnson* (1992) 3 Cal.4th 1183, 1215-1218), and when the defendant was the only person in a red shirt (*People v. DeSantis, supra*, 2 Cal.4th at p. 1222). Similarly, minor differences in facial hair also do not necessarily render a lineup unconstitutionally suggestive. (See *People v. Holt* (1972) 28 Cal.App.3d 343, 350, disapproved on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6.) And differences in background color and image size among the various photographs also do not necessarily render a lineup unconstitutionally suggestive. (*People v. Holt, supra*, 28 Cal.App.3d at pp. 349-350.) The test basically comes down to

this: whether the lineup as a whole would cause a witness to focus on a particular photograph, namely, the defendant's photograph. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.)

On appeal, a de novo standard applies to both prongs of the identification analysis. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459.) We have reviewed the photograph lineup from which Mendoza identified defendant, and are not persuaded that it is unconstitutionally suggestive. The lineup depicts six males who are sufficiently similar to support the reliability of Mendoza's identification. All six of the individuals appear to be Hispanic, all appear to be about the same age, all have short, dark hair and some form of facial hair. There are no distinctive markings in the background, or foreground or on their clothing to make one stand out in particular. Defendant's photograph—though more of a close up shot than the others—does not particularly stand out.

Moreover, even assuming the initial threshold showing of suggestiveness had been established, defendant's claim fails because the record, in our view, shows that Mendoza's in-court identification at trial was bolstered by ample indications of reliability to allow her to make the identification; it was for the jury to determine whether her in-court identification was accurate or tainted by the pretrial lineup. Mendoza provided a very detailed and accurate description fitting defendant prior to viewing the photographic lineup. She described him as a male Latino, chubby, between 5'6" and 5'8" (although she admitted she was not good at estimating heights), with a distinctive tapered hairstyle. She also described him as having very distinctive facial hair, with a single line growing from his lip to his chin. Although, while she was at the hospital, Mendoza had initially given a somewhat different description as to defendant's build, the disparities were easily explained by her pain and pain medication. Moreover, Mendoza had plenty of undistracted opportunity to observe defendant during the shooting, as she was only 16 feet away from him, there was sufficient lighting from the houses and streetlights, defendant was moving towards her rather than away from her, her opportunity to observe him lasted between 20 and 30 seconds, and there was nothing obstructing her view.

Mendoza also told Sergeant Rullamas that she thought she recognized defendant from somewhere, and prior to any further exposure, made the connection of having gone to grade school with him. Additionally, she made the connection of having seen defendant twice in 2005 when he visited her downstairs neighbors. Then, after having identified his picture in the photographic lineup, she was also able to identify him when, by chance, she happened to see his arrest while watching a television show on the Discovery Channel called “Gang Wars.” Also at the preliminary hearing, in the face of defendant’s smirks and smiles, and threats and vulgarities leveled by those in the audience, Mendoza positively identified defendant.

Mendoza’s level of certainty in her identification at trial was absolute. She identified defendant as the shooter within a second and repeatedly stated she was 100 percent sure he was the shooter. She confidently and positively identified him at trial, even when defendant was shaking his head at her.

The totality of the circumstances demonstrates that Mendoza’s pretrial identification was not made under impermissibly suggestive conditions and was reliable. (*People v. Cook* (2007) 40 Cal.4th 1334, 1354.) Thus, a motion to suppress the identification would properly have been denied. Counsel’s failure to challenge the evidence did not amount to ineffective assistance. As we conclude a challenge to the photo lineup procedure would have failed, we also reject defendant’s challenge to the in-court identification, which was premised on his contention that the pretrial identification was improperly conducted. (See *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1082, disapproved on other grounds in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370-1371.)

### 3. *Failure to Prepare Expert Witness*

Defendant also contends his trial counsel rendered ineffective assistance as a result of his failure to adequately prepare defense expert Dr. Shomer for trial. In particular, defendant claims that trial counsel failed to show Dr. Shomer the photo lineup, which prevented Dr. Shomer from telling the jury that the lineup was unfair and precluded him from explaining that defendant’s picture stuck out like a “ ‘sore thumb.’ ”

As previously explained, defendant has the burden to show his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result would have been different. (*Strickland, supra*, 466 U.S. at pp. 687-688; *People v. Kelly* (1992) 1 Cal.4th 495, 519-520; *Ledesma, supra*, 43 Cal.3d at pp. 216, 218.) Defendant has not met his burden.

Contrary to defendant's contention, it was not for Dr. Shomer to tell the jury that the lineup used in this particular case was unfair or that defendant's picture stuck out like a " 'sore thumb.' " Rather, it was within the exclusive province of the jury to decide, based on the factors described by Dr. Shomer, whether the photo lineup was problematic. Even if Dr. Shomer had viewed the photo lineup, it was beyond the scope of his testimony to comment on it or advise the jury about how it should view it. Specifically, Dr. Shomer testified: "I am not here to give any conclusion about who is right or wrong or the effects of how anyone in particular reacts to a situation. I . . . simply . . . provide information that may or may not be used in terms of evaluating the other evidence in this case. *I am not evaluating it*; I am simply here to give information about an aspect of it rather than to come to some conclusion based on some tests of a witness, . . . I am here simply to provide information about how these processes have been found to work, . . . if anyone desires to use them in evaluating accuracy of the identification in this case." (Italics added.)

On this record, even if trial counsel erred in not providing Dr. Shomer with a copy of the photo lineup (a position we do not take), there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. (*Strickland, supra*, 466 U.S. at pp. 687-688; *Kelly, supra*, 1 Cal.4th at pp. 519-520; *Ledesma, supra*, 43 Cal.3d at pp. 216, 218.)

### **C. *Evaluating Eyewitness Testimony***

#### **1. *CALCRIM No. 315***

Defendant contends that the court erred in utilizing an "unadorned" version of CALCRIM No. 315, which instructs the jury to consider, as one of many factors in

deciding whether an eyewitness gave truthful and accurate testimony, “how certain” the witness was when he or she made the identification.<sup>8</sup> Defendant argues that this part of the instruction deprived him of a fair trial by allowing the prosecution to “diminish the reasonable doubt standard.”

The California Supreme Court has held that the relevant factors to be considered in determining whether identification evidence is reliable are those identified by the United States Supreme Court in *Neil v. Biggers* (1972) 409 U.S. 188. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610; *People v. Arias* (1996) 13 Cal.4th 92, 168.) In *Neil v. Biggers*, the high court noted: “As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, *the level of certainty demonstrated by the witness at the confrontation*, and the length of time between the crime and the confrontation.” (*Neil v. Biggers, supra*, 409 U.S. at pp. 199-200, italics added.)

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<sup>8</sup> CALCRIM No. 315 instructed the jury in this case as follows: “You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] • Did the witness know or have contact with the defendant before the event? • How well could the witness see the perpetrator? • What were the circumstances affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? • How closely was the witness paying attention? • Was the witness under stress when she made the observation? • Did the witness give a description and how does that description compare to the defendant? • How much time passed between the event and the time when the witness identified the defendant? • Was the witness asked to pick the perpetrator out of a group? • Did the witness ever fail to identify the defendant? • Did the witness ever change her mind about the identification? • How certain was the witness when she made an identification? • Are the witness and the defendant of different races? • Was the witness able to identify the defendant in a photographic or physical lineup? • Were there any other circumstances affecting the witness’s ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find [ ] the defendant not guilty.”

The certainty factor also appeared in CALCRIM No. 315's predecessor, CALJIC No. 2.92. The California Supreme Court has consistently rejected challenges to CALJIC No. 2.92. (See *People v. Ward* (2005) 36 Cal.4th 186, 213; *People v. Johnson* (1992) 3 Cal.4th 1183, 1230–1231; *People v. Wright* (1988) 45 Cal.3d 1126, 1143–1144.)

Acknowledging the factors enumerated in *Neil v. Biggers*, but disregarding the California decisions, defendant quotes extensively from an out of state opinion citing scientific studies questioning the accuracy of eyewitness identification evidence. (See, e.g., *State v. Lawson* (Ore. 2012) 291 P.3d 673, 688 “[w]itness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors.”) Sister-state decisions may be persuasive, but they are not binding. (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 170.)

There is, however, no shortage of California authority on this topic. The California Supreme Court rejected an argument similar to defendant's in *People v. Johnson, supra*, 3 Cal.4th at pages 1231-1232. There, the defendant challenged the certainty factor, because his eyewitness identification expert “testified without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy.” (*Id.* at p. 1231.) The court held that the certainty factor of CALJIC No. 2.92 was neutral and did not instruct the jury to accept or reject the expert's testimony; the jury was free to reject it, even if uncontradicted. (*Id.* at pp. 1230, 1231-1232; see also *People v. Sullivan* (2007) 151 Cal.App.4th 524, 562; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303, disapproved on another point in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

In evaluating a claim of instructional error, the reviewing court must consider whether there is a reasonable likelihood of misapplication by evaluating the whole record, including the instructions in their entirety and the arguments that counsel presented to the jury. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4; *Kelly, supra*, 1 Cal.4th at pp. 526-527.) “The only question for us is ‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.’ ” (*Estelle, supra*, at p. 72.) “It is well established that the instruction ‘may not be judged in

artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” (*Ibid.*)

The jury instruction here set forth a multitude of factors that the jury might consider in evaluating the accuracy of the eyewitness testimony. Dr. Shomer’s testimony emphasized the need to consider factors other than the witness’s certainty, most of which were included in the non-exclusive list of factors (i.e., stress, unexpectedness, distance, duration, and lighting) included in the jury instruction. The instruction did not require the jury to find that an eyewitness who is certain is necessarily correct. Rather, the jury was instructed to weigh the different factors as it deemed appropriate.

Defendant contends the instruction fundamentally discredited his case, by conflicting with scientific research regarding reliability of eyewitness identification and Dr. Shomer’s testimony on this subject. Defendant complains that the prosecutor “emotionally repeated” Mendoza’s testimony that she was 100 percent positive in her identification of defendant as the shooter. According to defendant, this argument was bolstered by CALCRIM No. 315, and the combined effect “caused the jury to trust [the] prosecutor’s judgment rather than that of its own and that of science.” The prosecutor, however, did not argue that the jury should completely disregard Dr. Shomer’s testimony given Mendoza’s testimony. Rather, the prosecutor sought to discredit Dr. Shomer as being nothing more than a “professional [d]efense witness.” Moreover, the jury was not bound by the instruction to either accept or reject the testimony of Dr. Shomer or Mendoza. The jury was free to give the certainty factor little or no weight. The court instructed the jury that it must consider an expert’s opinions, but it was “not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide.” The inclusion of certainty as one factor to consider did not instruct the jury to disregard or to minimize the significance of Dr. Shomer’s testimony. There was no error in giving the instruction.

Finally, defendant did not object to the instruction or suggest a modification. The trial court must give the instruction when requested in cases “in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]” (*People v.*

*Wright, supra*, 45 Cal.3d at p. 1144 [CALJIC No. 2.92].) However, the court should consider reasonable modification of the instruction, if requested. (*Id.* at p. 1143.) The court has no sua sponte duty to modify the instruction. (*People v. Sullivan, supra*, 151 Cal.App.4th at p. 561 [CALJIC No. 2.92]; *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1384 [same].) Failure to object to an instruction forfeits the objection on appeal unless the instruction was erroneous or affected the defendant's substantial rights. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465; § 1259.)

On direct appeal, defendant contends that he has not forfeited his challenge to the certainty factor, arguing that his failure to object was excused because it would have likely been futile. He also argues that the instruction was an incorrect statement of the law. We disagree. We have already concluded the instruction was correct, and thus, an order overruling an objection to it would not have affected defendant's substantial rights.

## 2. *Adequacy of Representation*

In his habeas petition, defendant alternatively claims that trial counsel was ineffective for failing to seek a modification of CALCRIM No. 315 to remove certainty as a factor to be considered by the jury. In support of this contention, defendant relies on several scientific studies to support his position that the prevailing view is that—under most circumstances—eyewitness certainty is not a predictive indicator of accuracy.

Below, rather than objecting to the instruction, defendant's counsel attacked Mendoza's certainty by presenting expert testimony that eyewitness certainty is not indicative of accurate identification and by emphasizing other factors that tended to cast doubt on her ability to make an accurate identification—such as her distance from the suspect, the darkness of the evening, and her initial discrepancies regarding defendant's weight. Under the circumstances we cannot conclude that counsel's performance fell below the standard to be expected of trial counsel. Moreover, even if the attorney's failure to request a modification was deficient, defendant fails to show prejudice. Under the current state of the law, it is unlikely that a modified instruction would or should have been given even if requested. And if it had, it is not likely to have produced a different outcome. Defense counsel pointed out to the jury all of the reasons to reject Mendoza's

identification. The jury instructions directed jurors to consider numerous factors other than the witness's certainty which bore upon the reliability of the identification. Thus, defendant has failed to demonstrate either element necessary to establish ineffective assistance of counsel.

***D. September 25 Seizure Evidence and Resulting Fruits***

Defendant contends that his trial counsel rendered ineffective assistance by stipulating to the admission of the evidence from defendant's September 25 " 'interview,' " by failing to object to the admission of the blue bandana and gang writing seized from his person, by failing to object to the admission of the evidence obtained from the search warrant of Bandit's residence, and by failing to object to "the fruits that resulted from the illegal police conduct . . . ."

Once again, defendant has not met his burden of demonstrating deficient performance and ensuing prejudice. (*Strickland, supra*, 466 U.S. at pp. 687-688; *Kelly, supra*, 1 Cal.4th at pp. 519-520; *Ledesma, supra*, 43 Cal.3d at pp. 216, 218.)

***1. Traffic Stop***

Defendant contends the car in which he was travelling was illegally stopped for the purpose of arresting Bandit. The Fourth Amendment protects citizens from unreasonable searches and seizures by law enforcement. (*Katz v. United States* (1967) 389 U.S. 347, 353; *People v. Maury* (2003) 30 Cal.4th 342, 384.) "Although police officers may not arrest or search a suspect without probable cause and an exception to the warrant requirement, they may temporarily detain a suspect based only on a 'reasonable suspicion' that the suspect has committed or is about to commit a crime. [Citations.] Such detentions are permitted, notwithstanding the Fourth Amendment's requirements of probable cause and a search warrant, because they are 'limited intrusions' that are 'justified by special law enforcement interests.' [Citations.]" (*People v. Bennett* (1998) 17 Cal.4th 373, 386-387 (*Bennett*).)

" '[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to

occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. (3) The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]’ ” (*People v. Loewen* (1983) 35 Cal.3d 117, 123.)

Here, police received two separate reports that Bandit was the shooter in the incident claiming Casillas’s life and severely wounding Mendoza. Specifically, two days after the shooting, Sergeant Rullamas received information from a reliable, confidential informant that Bandit committed the shootings. Three days later, Sergeant Rullamas received information from an anonymous caller that corroborated the tip from the confidential informant. The anonymous caller said Bandit “is” the shooter. The caller also indicated that the shootings were gang-related because Mendoza’s brother was purportedly a Norteño gang member. The caller also provided a brief physical description of Bandit.

In addition to the reports that Bandit was the shooter, Sergeant Rullamas also obtained information that Bandit was in possession of a rifle. Mendoza’s mother, Sandra Reyes, met with Sergeant Rullamas approximately five days after the shootings and told him that she saw someone, who she later identified as Bandit, driving down her street in a red car. Reyes said that Bandit was with another man, and both appeared to be armed. She saw Bandit holding what appeared to be a large rifle or shotgun. Reyes described seeing the barrel of a rifle sticking up approximately six inches from the base of the car window.

Based upon this information, Sergeant Rullamas requested the gang task force to arrest Bandit for possession of an assault rifle. That Bandit was twice identified as the shooter and that he was observed driving down Mendoza’s street, possibly following her mother, with an observable weapon sticking out of the car were specific and articulable

facts that gave rise to a reasonable suspicion that he may be involved in criminal activity, which justified his detention.

That Reyes did not specifically refer to an “assault” rifle and that Bandit was spotted in a blue minivan and not a red car, does not convert the investigatory stop into an unlawful detention. Simply put, the facts known to Sergeant Rullamas indicated that Bandit *may* be involved in unlawful activity, and that is all that was needed to stop the car. (*People v. Hernandez* (2008) 45 Cal.4th 295, 299; see *People v. Durant* (2012) 205 Cal.App.4th 57, 62-63 [traffic stops are investigatory detentions that need only be supported by suspicion of a Vehicle Code violation or criminal activity]; *People v. Logsdon* (2008) 164 Cal.App.4th 741, 746 [“[T]he question is not whether [the defendant] *actually* violated the statute. Rather, the issue was if some ‘objective manifestation’ that the person *may* have committed such an error was present. [Citation.]”]) Accordingly, defendant’s claim that the traffic stop violated the Fourth Amendment fails.

## 2. *Patdown and Removal of Papers*

Defendant next contends that even assuming *arguendo* that the police effected a valid traffic stop, the search of his person and removal of his papers exceeded the scope of a valid *Terry*<sup>9</sup> search.

Under *Terry*, “ ‘when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,’ the officer may conduct a patdown search ‘to determine whether the person is in fact carrying a weapon.’ [Citation.] ‘The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .’ [Citation.] Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly ‘limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.’ [Citations.] If the protective search goes

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<sup>9</sup> *Terry v. Ohio* (1968) 392 U.S. 1.

beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. [Citation.]” (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.)

Defendant argues that the blue bandana and three sheets of papers removed from his person did not resemble weapons and that no reasonable police officer would believe these items to be weapons. Although we agree that the items seized from defendant’s person exceeded the scope of a permissible *Terry* search, his claim of ineffective assistance of counsel, nevertheless, fails. In addition to establishing deficient performance, a defendant must demonstrate that but for counsel’s error a different outcome would have resulted. (*Strickland, supra*, 466 U.S. at pp. 687-688; *Kelly, supra*, 1 Cal.4th at pp. 519-520; *Ledesma, supra*, 43 Cal.3d at pp. 216, 218.) On this record, given the plethora of other, more incriminating gang-related evidence, the failure to move to suppress the evidence from the traffic stop—the blue bandana and gang-related writings—did not prejudice defendant.

### 3. *De Facto Arrest*

Defendant claims that he was under de facto arrest when the police removed him from the mini-van, searched him for weapons, handcuffed him and transported him to the police station. According to defendant, probable cause did not support his de facto arrest. And, as such, his interview with police, along with the video and still photographs from that interview, which depict his distinct facial hair, would have been excluded had defense counsel moved to suppress this evidence. We disagree.

“ ‘There is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.’ [Citations.] Important to this assessment, however, are the ‘duration, scope and purpose’ of the stop.” (*People v. Celis* (2004) 33 Cal.4th 667, 674-675 (*Celis*).)

The length or brevity of the stop is a critical factor in this assessment. (*Celis, supra*, 33 Cal.4th at p. 675.) As to the scope of the police intrusion, *Celis* observes that “stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, . . . do not convert a detention into an arrest. (See *People v. Soun* (1995) 34 Cal.App.4th 1499, 1517 [detention when the defendant ‘was removed from the car at gunpoint by a large number of police officers, was forced to lie on the ground, was handcuffed and placed in a patrol car, was transported from the site of the stop a distance of three blocks to a parking lot,’ where he was held for 30 minutes]; *In re Carlos M.* [1990] 220 Cal.App.3d [372] at p. 384 [detention when the defendant was handcuffed and transported to hospital for identification by rape victim; 30-minute duration]; *Haynie v. County of Los Angeles* (9th Cir.2003) 339 F.3d 1071, 1077 [‘A brief . . . restriction of liberty, such as handcuffing, during a *Terry* stop is not a de facto arrest’]; *Gallegos v. City of Los Angeles* (9th Cir.2002) 308 F.3d 987, 991 [driver stopped at gunpoint and ordered out of his truck, handcuffed and held in a patrol car for between 45 and 60 minutes was detained, not arrested]; *United States v. Alvarez* (9th Cir.1990) 899 F.2d 833, 838-839 [investigative detention when the defendant forced at gunpoint to get out of his car]; *United States v. Buffington* (9th Cir.1987) 815 F.2d 1292, 1300 [no arrest when driver was stopped at gunpoint, ordered out of car and forced to lie on the ground]; *United States v. Bautista* (9th Cir.1982) 684 F.2d 1286, 1289 [handcuffing did not convert detention into arrest]; but see *People v. Campbell* (1981) 118 Cal.App.3d 588, 595-596 [the defendant functionally under arrest when police at an airport stopped him at gunpoint, handcuffed him, and took him to an office for questioning; restraint went beyond that ‘reasonably necessary for a detention’].)” (*Celis, supra*, at p. 675.)

Viewed in the context of these authorities, the brief and minimally intrusive restraint on defendant’s freedom of movement, while he was handcuffed and transported to the station, did not rise to the degree associated with a formal arrest. Moreover, although it appears that defendant was at the police station for several hours before he was released, nothing in the record suggests that the otherwise investigative detention

transmogrified into a formal arrest. Accordingly, defense counsel was not ineffective in failing to move to suppress the challenged evidence.

#### *4. Search of Residence*

Defendant next contends that defense counsel was ineffective in failing to move to suppress the evidence found in Bandit's residence because Sergeant Rullamas lacked sufficient probable cause to justify the search. We disagree.

In his supporting search warrant affidavit, Sergeant Rullamas averred there was probable and reasonable cause to issue a search warrant based on the following facts: On the evening of September 19, 2008, he was working as an investigator with the Oakland Police Department homicide unit, when he was called to respond to a homicide. He spoke with a patrol officer who advised him that there had been a double shooting, where a male had been shot several times and died from his injuries, and a female companion had been shot several times and was in critical condition. The only other information the officer had was that the suspect apparently had driven up and "fired upon the victims with an assault rifle."

Sergeant Rullamas further attested that on September 21, 2008 he discussed the case with Officer G. Melero from the police department's gang unit. Officer Melero told Sergeant Rullamas that "a reliable confidential informant, with whom he has successfully worked with for years, told him that word on the street is that a person with a nickname of Bandit is the killer." The informant, however, did not actually witness the crime. Officer Melero told Sergeant Rullamas he knew Bandit's real name was Manuel Hernandez and that he was a high ranking Sureño gang member.

Sergeant Rullamas also attested that on September 23, 2008, he received an anonymous call from a person who said a man known as " 'Bandit' is the shooter in this case." The caller told Sergeant Rullamas that Bandit shot the victims because Mendoza's brother is a Norteño gang member.

Sergeant Rullamas further attested that he spoke with Mendoza's mother, Sandra Reyes, who said that as she was walking down her street, she saw a car in a nearby intersection with a man holding what appeared to be a rifle. Reyes explained that she

was able to see the barrel of the firearm sticking up about six inches from the base of the window, as if the butt of the gun were on the floorboard with the barrel pointed straight forward. Reyes picked out Bandit from a photo lineup.

After his interview with Reyes, Sergeant Rullamas discussed the case with Officer C. Bunn, who then emailed Sergeant Rullamas five photographs—one depicting Bandit holding what appears to be a sawed-off shotgun, and another three showing him displaying gang signs.

Based upon the above information, Sergeant Rullamas met with the gang task force unit and requested they arrest Bandit on suspicion of possessing an assault rifle. Following Bandit's arrest, Sergeant Rullamas verified Bandit's address and requested a search warrant for firearms and gang paraphernalia.

In deciding whether the search warrant affidavit establishes probable cause, “[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) In other words, “ ‘[i]n determining the sufficiency of an affidavit for the issuance of a search warrant the test of probable cause is . . . whether the facts contained in the affidavit are such as would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion of the guilt of the accused.’ [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.)

Reliability is but one element of the probable cause determination. “[A]n informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are all highly relevant in determining the value of his [or her] report. . . . [T]hese elements . . . should be understood . . . simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.” (*Illinois v. Gates, supra*, 462 U.S. at p. 230.) “It is well settled that information from an untested or unreliable

informant does not establish probable cause unless it is ‘corroborated in essential respects by other facts, sources or circumstances.’ ” (*People v. Maestas* (1988) 204 Cal.App.3d 1208, 1220.) Also entitled to credit is an informant who provides a large amount of detailed, firsthand information. (See *People v. Foster* (1988) 201 Cal.App.3d 20, 24.) The affidavit must also provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 298, citing *People v. Mesa* (1975) 14 Cal.3d 466, 470.)

Probable cause is less than proof beyond a reasonable doubt, less than a preponderance of the evidence, and less than a prima facie showing. (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783.) A reviewing court does not conduct a de novo review of the sufficiency of the affidavit and must accord great deference to a magistrate’s finding of probable cause. (*People v. Aho* (1985) 166 Cal.App.3d 984, 991; *Illinois v. Gates, supra*, 462 U.S. at p. 236.) Doubtful or marginal cases should be resolved in favor of upholding the warrant. (*U.S. v. Ventresca* (1965) 380 U.S. 102; *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 203-204; *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1716.)

The challenged search was conducted pursuant to a warrant and is therefore presumed to be reasonable under the Fourth Amendment. “Searches supported by a warrant are presumed reasonable, and the defendant must prove the contrary.” (*People v. Contreras* (1989) 210 Cal.App.3d 450, 454.) A “magistrate’s determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.]” (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

Here, looking at the totality of the circumstances, there was more than sufficient information to establish probable cause to issue the warrant. The affidavit, signed by Sergeant Rullamas recited that, as an officer with Oakland Police Department, he had “investigated thousands of crimes,” and had received formal and informal training from experienced criminal investigators. Sergeant Rullamas then recited the probable cause information. He explained that he spoke with Officer Melero from the gang unit, who

established the reliability of the confidential informant. If an informant has provided accurate information on past occasions, he or she may be presumed trustworthy on subsequent occasions. (See, e.g., *People v. Dumas* (1973) 9 Cal.3d 871, 876.) Sergeant Rullamas also indicated that although the confidential informant did not witness the crimes, the informant knew that Bandit was “feeling pressure from both the Sureños and Norteño gang members, because the victims were not gang members and had no prior criminal history.”

In such a case, there is no requirement for strict corroboration of the information; the court need only conduct a “practical, nontechnical” review of the circumstances. (*People v. Hansborough* (1988) 199 Cal.App.3d 579, 584.)

Veracity also may be demonstrated through independent police corroboration of the information provided. (*People v. Terrones* (1989) 212 Cal.App.3d 139, 146-147.) *People v. Rothen* (1988) 203 Cal.App.3d 684, 687-688.) For example, in *People v. Rothen, supra*, 203 Cal.App.3d 684, a police officer’s affidavit stated he had learned from an informant that a woman named Nellie sold drugs from her home. The informant gave the officer Nellie’s telephone number, and when the officer dialed the number a female answered and identified herself as Nellie. The female agreed to sell drugs to the informant. The court held this was sufficient corroboration of the informant’s statements, even though there was no verification that Nellie lived at the address in question. It stated: “The purpose served by corroboration is ‘to establish that the information provided by the informant did not constitute a made-up story, one fabricated out of whole cloth. Corroboration of part of the information provided by the informant [gives] credibility to the remainder of the information.’ [Citation.]” (*People v. Rothen, supra*, 203 Cal.App.3d at p. 689.)

Here, similarly, it was not necessary to provide independent corroboration of each fact in the confidential informant’s statements to establish probable cause. In addition to the information provided by the confidential informant, Sergeant Rullamas received an anonymous call from a person who said that Bandit was the shooter.

Sergeant Rullamas also interviewed one of the victim's mother, who identified Bandit in a photo lineup as the person who was driving down her street with a rifle sticking out of a car window.

Regarding basis of knowledge, the affidavit recited that the confidential informant had successfully worked with Officer Melero for years and that Officer Melero had closely interacted with members of the local Hispanic gangs.

This information, considered in conjunction with the other information in the affidavit, was sufficient to allow the magistrate to make an informed probable cause determination. Thus, the lack of corroboration claimed by defendant was not fatal because it did not cast doubt on the main factors in the totality of circumstances test: the confidential informant's veracity and the basis of his or her knowledge. In other words, the totality of the circumstances was sufficient to support the magistrate's conclusion that there was a fair probability of criminal activity on the premises named in the affidavit. (*Illinois v. Gates, supra*, 462 U.S. at p. 238.) Defense counsel, therefore, did not render ineffective assistance by failing to move to quash the search warrant and to suppress the evidence.

Separately and alternatively, however, even assuming there was an insufficient showing of probable cause, we conclude that the search was saved by the so-called "good-faith" exception to the exclusionary rule. Under this exception, exclusion is not required "where police officers act in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid for lack of probable cause . . . ." (*People v. Willis* (2002) 28 Cal.4th 22, 30.) However, "the good faith exception does not apply 'where the issuing magistrate wholly abandoned his judicial role,' where the affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' " or where the warrant was 'so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.' [Citation.] Thus, courts must determine 'on a case-by-case basis' whether the circumstances of an invalid search pursuant to a warrant require the exclusionary rule's

application. [Citation.]” (*Id.* at p. 32, quoting *United States v. Leon* (1984) 468 U.S. 897, 923, 918.)

Defendant argues that the affidavit was so lacking in probable cause that a reasonable officer would not have presumed it to be valid. We disagree. A reasonably well-trained officer would have believed the affidavit provided a substantial basis for finding probable cause. The confidential informant had provided reliable information in the past and had knowledge that Bandit was the shooter. The confidential informant explained that Bandit was “feeling pressure” from both the Sureños and the Norteños because the victims were not gang members. The information was corroborated by an anonymous caller. Sergeant Rullamas’s independent investigation revealed that Bandit was a gang member and that he had been seen driving near the crime scene pointing a rifle at one of the victim’s mothers. Hence, Sergeant Rullamas’s conclusion that firearms and gang-related paraphernalia would be found at Bandit’s residence was by no means unreasonable.

Since Sergeant Rullamas’s conclusion was reasonable, the subsequent execution of a facially valid warrant, issued by a neutral magistrate, was done in good faith. Therefore, even if the warrant was invalid for lack of probable cause, its execution was nonetheless proper. (*Massachusetts v. Sheppard* (1984) 468 U.S. 981, 987-988.)

We conclude that the “good-faith” exception applies. Thus, even assuming defense counsel should have challenged the sufficiency of the probable cause supporting the search warrant, the searching officers acted in good faith on what appeared to be a facially valid warrant signed by a neutral magistrate. (*United States v. Leon, supra*, 468 U.S. at p. 923.) Accordingly, defense counsel cannot be faulted for failing to file a futile motion.

#### ***E. Impartial Jury***

Defendant contends he was denied his right to a fair trial and an impartial jury when the court failed to conduct a more thorough examination of the jury following a derogatory comment he allegedly thought he heard and by failing to remove Juror

Number 30 for cause after she expressed concerns about being harassed and possibly followed by a car full of male Hispanics.

*1. Perceived Derogatory Comment*

During the third week of trial, as the jurors were leaving the courtroom, defendant complained to counsel that he had heard a female voice whisper the word “murderer.” Counsel informed the court and further stated that it may have been either Juror Number 21 or 30. The bailiff had also heard someone whisper something, although he asserted that the juror had made the comment to him, and that the innocuous comment was “see you tomorrow.” Neither the defense attorney, nor the prosecutor, who were standing nearby, had heard anything.

The court stated that it would individually voir dire the female jurors the next day. The prosecutor commented that such voir dire may be more damaging than helpful and questioned the defendant’s credibility. The court echoed comments regarding the bailiff’s credibility and noted the possibility that further inquiry might cause the jury to speculate negatively; the court chose to reserve the matter.

The following day the court chose not to individually voir dire the jurors. Instead, the court made a factual finding that credited the bailiff’s statement. The court noted that both the district attorney and defense counsel were in close proximity and did not hear anything. The court further noted that Jurors 21 and 30 had left much earlier, that defendant could not identify a particular juror as having made the statement, and credited the bailiff’s observation that what was said at most was “see you tomorrow.” Specifically, the court ruled as follows: “I am going to make a factual finding that the word ‘Murderer’ was not whispered to the defendant as he has stated. At best, the defendant, in my view, might have misinterpreted the statement, ‘See you tomorrow.’ Maybe the ‘morrow’ part . . . might have sounded like ‘murderer,’ but that is what I so find.” No further objection or discussion occurred and, outside of a subsequent admonition to the jury, the matter was closed.

A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct “whenever the court is put on notice that good cause to discharge a juror may

exist.” (*People v. Burgener* (1986) 41 Cal.3d 505, 519, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) On this record, we cannot conclude that the trial court was put on notice of good cause to discharge the unknown juror. Accordingly, it did not err in refusing defendant’s request to conduct an inquiry into whether the jury had prejudged the case.

Defendant merely speculates that there might have been jury misconduct. The trial court did not abuse its discretion in failing to interrogate the jurors about a purported comment that no one, other than defendant, heard. (See *People v. Nesler* (1997) 16 Cal.4th 561, 582 [trial court’s “credibility determinations and findings on questions of historical fact” concerning juror misconduct upheld if based on substantial evidence].)

Accordingly, no duty arose on the part of the trial court to conduct an inquiry of the jury.

## 2. *The “Fearful Juror”*

Defendant next complains that the court should have removed Juror Number 30 after she complained that she was harassed by a person of “mixed race” at a market over the weekend and later might have been followed by a car full of Hispanic males. After conducting a thorough voir dire and assuring the juror that she was not in danger, the court elicited her repeated statement that she could perform her duty and would remain fair and impartial.

Defendant argues that the court had no choice but to conclude that the juror was biased because she expressed fear for her situation. The court, however, specifically asked Juror 30 if she could keep an open mind, perform her duties and be a fair and impartial juror.

Section 1089 permits the court to remove a juror for cause when the juror is unable to perform his or her duties. However, outside of the normal stress expressed by the juror in this type of case, and later echoed by the court and all of the jurors, there was no evidence that Juror Number 30 was in any way unable to perform her obligations. To the contrary, she repeatedly and credibly stated her ability to be fair and impartial.

On this record, there was no conceivable error by failing to excuse Juror Number 30.

*3. Adequacy of Representation*

In a related claim, defendant asserts that trial counsel was ineffective for failing to seek removal of Juror Number 30. This contention is without merit. As noted above, after conducting a thorough voir dire, the court did not excuse the juror and the juror repeatedly assured the court that she could remain fair and impartial, and would not let her weekend experience influence her service on the jury. A motion to excuse the juror would have failed. Thus, defendant fails to show a prima facie case for relief based on counsel's inaction.

***F. Prosecutorial Misconduct***

Defendant next contends the prosecutor committed misconduct by asking a witness questions about defendant's demeanor during the preliminary hearing testimony of victim Mendoza, and by commenting on that evidence during closing argument. In a related claim, he asserts that his counsel rendered ineffective assistance of counsel by failing to object to the purported misconduct during closing argument.

*1. Background*

At trial, during the prosecutor's opening statement, defendant started to shake his head "no" when the prosecutor called him a murderer. Upon seeing defendant's behavior, the trial court excused the jury and admonished defendant that his nonverbal conduct was inappropriate.

Shortly after the court's warning, the prosecution called Casillas's sister, Rebecca Navarro. The prosecutor asked Navarro about Mendoza's preliminary hearing testimony and whether she could see if defendant was "doing something" during Mendoza's testimony that appeared to be directed at Mendoza. Defense counsel objected on relevancy and foundational grounds, which the court overruled. Navarro stated that defendant was "smirking and smiling" at Mendoza as she testified at the preliminary hearing.

Then, once Mendoza took the stand at trial and began to testify, defendant started to shake his head “no.” Outside of the presence of the jury, the court re-admonished defendant about his inappropriate behavior, ordering him to “[c]ease, stop, [and] desist,” or else the court would deem defendant to be waiving his right to remain silent and would put defendant on the witness stand. Once the jury was brought back into the courtroom, Mendoza continued with her testimony.

Mendoza testified that defendant smiled and smirked at her during the preliminary hearing. Also, a woman in the audience mouthed the word “bitch” at Mendoza and other “foul things,” that upset Mendoza as she testified. Mendoza said she was scared when she testified at the preliminary hearing.

During the prosecutor’s closing argument, he stated, “[y]ou have seen the defendant in this court over the course of this trial. You have seen him every day. He looks scared. I would be scared too if I were facing a conviction of murder.” Defense counsel’s objection to these statements was overruled. Later, in closing argument, the prosecutor said, “What about the defendant’s conduct during Janett [Mendoza’s] testimony at the preliminary hearing where he is smiling and smirking at Janett during her testimony in an attempt to intimidate her? That is not what an innocent person would do. It’s like he was taunting her.” Defense counsel did not object.

## 2. *Comments About Defendant’s Demeanor*

“A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.” (*People v. Avila* (2009) 46 Cal.4th 680, 711 [applying both federal and state standards].) The Attorney General contends defendant forfeited his claims of misconduct by failing to object on the asserted grounds at trial.

It is well-settled that a claim of prosecutorial misconduct is generally reviewable on appeal only if the defense makes a timely objection at trial and asks the trial court to admonish the jury to disregard the prosecutor’s question. (*People v. Sapp* (2003) 31 Cal.4th 240, 279.) A defendant’s failure to object or request an admonition is excused if

either would be futile or an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

Defendant acknowledges defense counsel failed to object to the prosecutor's additional comments or request admonitions to any other aspect of rebuttal argument. He asserts that raising an objection or requesting an admonition would have been futile given the fact that the trial court had overruled the prior objections. Alternatively, defendant argues defense counsel was prejudicially ineffective for failing to object and request such admonitions to the rebuttal argument. We will therefore address defendant's arguments on the merits given his claim of ineffective assistance. (*People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

Defendant contends that the prosecutor committed misconduct by eliciting testimony about his demeanor at the preliminary hearing and during closing argument by commenting about this demeanor. Defendant is correct that a prosecutor may not comment on a nontestifying defendant's demeanor or behavior during the guilt phase. (See e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 434; *People v. Heishman* (1988) 45 Cal.3d 147, 196-197.) Here, however, the prosecutor did not comment on defendant's behavior at trial, but his demeanor at the preliminary hearing as Mendoza was testifying. This evidence was relevant to the jury's assessment of Mendoza's credibility both at the preliminary hearing and at trial. Evidence Code section 780 provides in pertinent part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness *any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . .*" (Italics added.) Here, evidence of defendant's behavior served to bolster Mendoza's credibility with respect to her identification of defendant as the shooter. Even as she was taunted by defendant and his supporters, Mendoza remained steadfast in her identification of defendant. The prosecutor did not suggest the jury should convict defendant based on his courtroom demeanor. Rather, the prosecutor focused on Mendoza's credibility.

To the extent the prosecutor's comment that defendant looked "scared" implied a consciousness of guilt, this comment was improper. But given the overwhelming evidence of defendant's guilt, he is not entitled to relief based on this stray comment under the applicable federal or state standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Finally, defendant also contends that the prosecutor's comments improperly highlighted his exercise of his constitutional right to remain silent in the face of criminal charges (*Griffin v. California* (1965) 380 U.S. 609, 615), but nothing in the prosecutor's comments either directly or indirectly implicated the decision not to testify. (E.g., *People v. Combs* (2004) 34 Cal.4th 821, 866-867.)

"When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 overruled on another point in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) On the record here, the answer is no.

#### **G. Cumulative Error**

Defendant argues the cumulative impact of the errors he raises on appeal mandates reversal. Because we conclude defendant has failed to establish any prejudicial error, there was no cumulative prejudice to him. (*People v. Riel* (2000) 22 Cal.4th 1153, 1215 [rejecting cumulative error argument where the was "no error that, even in cumulation, was prejudicial"].)

#### **H. Remaining Habeas Claims: Ineffective Assistance of Counsel**

Defendant raises four additional claims of ineffective assistance of counsel. According to defendant, trial counsel rendered ineffective assistance of counsel by failing to: 1) deliver on promises made during opening statement; 2) object to the admission of gun evidence; 3) move for the disclosure of the confidential informant; and 4) object to the prosecutor's closing argument commenting on Dr. Shomer's testimony.

We skip the analysis of whether trial counsel's performance fell below prevailing professional norms and proceed directly to the question of prejudice. (*People v. Holt*

(1997) 15 Cal.4th 619, 703; *In re Fields* (1990) 51 Cal.3d 1063, 1079.) We find there is no basis for defendant's argument that counsel's alleged failings prejudiced him. Ample evidence at trial established his culpability for the offenses: credible eyewitness testimony by one of the victims, who repeatedly and confidently identified defendant as the shooter; defendant's self-admission of being a gang member; as well as various gang-related evidence. Thus, it is not reasonably probable that the outcome of the trial would have been more favorable had trial counsel called the witnesses he mentioned during opening statement, objected to the gun evidence, moved for disclosure of the confidential informant, and objected to the prosecutor's comments during closing argument about Dr. Shomer's testimony. We consequently reject these arguments.

### **III. DISPOSITION**

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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REARDON, J.

We concur:

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RUVOLO, P.J.

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RIVERA, J.